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Nos. 92-593, 92-767

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MIGUEL DE GRANDY, *et al.*,
Appellants,

v.

BOLLEY JOHNSON, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,

v.

STATE OF FLORIDA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLEES

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QUESTIONS PRESENTED

1. Whether a single-member district reapportionment plan that provides minorities in the challenged area with voting control over districts at a level that is directly proportional to their percentage of the population in the area (and substantially in excess of their percentage of eligible voters) violates Section 2 of the Voting Rights Act.

2. Whether a reapportionment plan that provides at least proportional representation to two minority groups and also, given existing residential patterns, most fairly balances the "competing interests" of those groups violates Section 2 of the Voting Rights Act.

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STATEMENT

These appeals, along with a consolidated appeal in No. 92-519, *Johnson v. De Grandy,* involve a challenge to the reapportionment plan adopted by the State of Florida after the 1990 federal decennial census. In the district court, a group of Hispanic plaintiffs, referred to here as the "De Grandy" appellants, and the United States, which generally supported the De Grandy effort, failed in their challenge under Section

2 of the Voting Rights Act, 42 U.S.C. § 1973, against the Florida plan for the State Senate, but prevailed against the plan for the State House of Representatives.

1. *The Reapportionment Process*. Pursuant to the Florida Constitution, Art. III, § 16(a), the legislature is required to develop a reapportionment plan, based on the decennial federal census, to govern House and Senate elections. In anticipation of the 1990 census, and cognizant of the large population changes in Florida during the 1980's, the legislature began preparing for this assignment in 1987. The House and the Senate hired expert technical staff and provided them with state-of-the-art computer systems. Both chambers appointed Committees on Reapportionment to aid in developing legislative plans, and both committees included African-American and Hispanic members in key decision-making positions. Testimony of Representative Miguel De Grandy, Tr. IV, 42-45; Testimony of Representative Willie Logan, Tr. VII, 73-77; Testimony of Leon Russell, Vice President of the State Conference of the NAACP, Tr. III, 107-108, J.A. 425-426. The House and Senate also cohosted 32 public hearings throughout the State and two statewide teleconferences. The purpose of the hearings and teleconferences was to ensure increased public awareness about reapportionment and to provide the legislature with public input prior to the adoption of reapportionment plans.

According to 1990 census data, Florida's total population increased from 9,746,324 in 1980 to 12,937,926 in 1990.[1] In

[1] Bureau of the Census, Pub. PC80-1-B11, 1980 Census of Population (Florida) 26 (Aug. 1982); Bureau of the Census, Pub. CN:11271491053, 1990 Census of Population and Housing (Florida) 1 (Jan. 1991).

1990, there were 9,475,326 whites, which amounted to 73% of the State's total population; 1,701,103 African-Americans (13%); 1,574,143 Hispanics (12%); and 187,354 others (1%). *Id.*[2]

Dade County, which is the part of the Senate reapportionment plan that was challenged below, is Florida's most populous county. During the 1980's, Dade's total population increased by 19 percent, from 1,625,781 to 1,937,094. 1980 Census at 34; 1990 Census at 59. But the County's growth did not keep pace with that of the State as a whole. As a result, in the 1992 reapportionment, Dade lost a Senate seat and is, on a *pro rata* statewide basis, now entitled to six out of a total of forty such seats. *See* Testimony of Miguel De Grandy, Tr. II, 155-156.[3]

Hispanics make up 49 percent of Dade County's total population and 50 percent of its voting age population (VAP). *See* 1990 Census at 59. Whites make up 30 percent of the County's total population and 32 percent of the VAP; and

[2] The term "whites" refers to persons classified in Bureau of Census publications as "non-Hispanic whites." Similarly, the term "African-Americans" refers to the persons classified in Census publications as "non-Hispanic blacks." The term "Hispanics" refers to persons of "Hispanic origin (of any race)." The term "others" refers to persons not of Hispanic origin in all other racial categories used by the Census (including "American Indian, Eskimo, and Aleut," "Asian and Pacific Islander," and "Other Races").

[3] The Florida Constitution, Art. III, § 16(a), allows for between 30 and 40 Senate districts. Dade County's population is 1,937,094. The ideal Senate District is made up of 323,448 people, based on a statewide population of 12,937,926 divided into 40 equal-sized districts. Dade is thus numerically entitled to 5.99 Senate districts.

African-Americans make up 19 percent of the total population and 16 percent of the VAP. *See* 1990 Census at 59; *see also* U.S. Exh. 7, 24-25, 61. The number of Hispanics living in Dade County increased by 372,413 people or 64 percent in the period from 1980 to 1990. *See* 1980 Census at 34; 1990 Census at 59. This substantial gain was primarily the result of immigration from Latin American countries. Testimony of Dr. Dario Moreno, Tr. II, 14, 18-19; *see also* U.S. Exh. 37, 5-6. More than half of the County's Hispanic voting age population is non-citizen. Testimony of William DeGrove, Tr. VII, 17-18, J.A. 306-307.[4]

2. *The Reapportionment Plan*. On April 10, 1992, the Florida Legislature, relying on the information obtained from the 1990 Census and from its public hearings, adopted Senate Joint Resolution 2-G (the "Plan") reapportioning the State's forty senatorial districts. The Plan created five Senate districts wholly within Dade County (Districts 34, 36, 37, 38 and 39) and two Senate districts (Districts 32 and 40) that are

[4] While not available to the appellees at the time of trial, official United States Census Bureau data from 1990 indicate that 53 percent of Dade County's voting age Hispanics are non-citizens; and as a result, Hispanics make up only 35.4 percent of the total *citizen* VAP in the County. *See* Memorandum for the Record from Robert Kominski, Chief, Education & Social Stratification Branch, Bureau of the Census, United States Department of Commerce (June 8, 1992) and associated tabulations, J.A. 233-241; 1990 Census at 59; *see also* p. 9, note 12, *infra*. Hispanic citizenship data have now been formally published. *See* Bureau of the Census, Census of Population and Housing, 1990: Summary Tape File 4 (Florida) [machine-readable data files] (1993). Those data indicate that 47 percent of all Hispanics in Dade County are non-citizens; by contrast, only 5 percent of whites and 19 percent of blacks living in Dade County are non-citizens. *Id.*

made up of a part of Dade County and a part of an adjoining county — one to the north and one to the south.[5] Hispanics constitute a majority of the VAP in three of the Senate districts wholly within Dade County; whites constitute a majority in one of the two remaining districts wholly contained within the County as well as in one of the districts partly in the County; and African-Americans constitute a majority in the other district wholly within the County and a controlling plurality in the other district partly within it. U.S. Exh. 7, 24-25.[6]

On April 13, 1992, the Florida Attorney General petitioned the Florida Supreme Court for judicial review of the

[5] The fact that two of these districts extend outside Dade County to a neighboring county is a result of geography and has never been challenged on Section 2 or constitutional grounds. The southernmost county in Florida (directly below Dade) is Monroe County, which has approximately 78,000 people. That county is joined with approximately 246,000 people from south Dade County and downtown Miami to achieve a district that is approximately the same size as the other 39 Senate districts. By the same token, a second district with approximately 76,000 residents in northwest Dade County is completed by including approximately 248,000 persons from adjacent Broward County to the north.

[6] The district court found that, in District 40, "African-Americans can elect a candidate of their choice because of strong minority coalitions between the African-Americans and the Mexican-Americans, as well as white cross-over votes." U.S. App. 65a. (The United States and the De Grandy appellants have both reprinted the judgment and opinion below in appendices to their respective jurisdictional statements. We will cite to the Appendix filed by the United States ("U.S. App.")).

Plan, as provided by the State Constitution.[7] On May 13, 1992, the Court approved the Plan. *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So.2d 276 (Fla. 1992). The Florida Attorney General then submitted the Plan to the United States Department of Justice for preclearance review pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.[8] On June 16, 1992, the United States issued its preclearance decision, stating that its sole objection was to the Plan's Senate districts because of a problem it perceived in the Hillsborough County (Tampa) area. U.S. Exh. 16. In response, on June 22, 1992, the Florida Supreme Court amended the Plan to remedy this objection. *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 601 So.2d 543 (Fla. 1992).

The De Grandy appellants fully participated in the proceedings before the Florida Supreme Court, arguing that the Plan violated Section 2 of the Voting Rights Act because it failed to create additional majority-minority districts. 597

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[7] Art. III, § 16(c), Fla. Const., provides:

> (c) JUDICIAL REVIEW OF APPORTIONMENT. Within fifteen days after the passage of the joint resolution of apportionment, the attorney general shall petition the supreme court of the state for a declaratory judgment determining the validity of the apportionment. The supreme court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment.

[8] Because of a previous failure to have bilingual ballots, five Florida counties, but not Dade, are subject to the preclearance requirements of Section 5.

So.2d at 284. Concentrating on Dade County's Senate districts, the appellants contended that a fourth majority Hispanic Senate district should have been created. *Id.* The Florida Supreme Court rejected this contention, finding that the Plan did not discriminate against minorities. *Id.* at 285. The Court also found the Plan to be a material improvement over the 1982 plan because it provides minorities with substantial opportunities to influence elections and to elect representatives of their choice. *Id.* The Court's ruling was without prejudice to any interested party's right to file a subsequent petition before it alleging a violation of Section 2 of the Voting Rights Act. *Id.* The De Grandy appellants declined to file such a petition, choosing instead to seek leave to amend the complaint that they had previously filed in federal court. R. 448.[9]

3. *The Federal Court Proceedings.* In their amended complaint, the De Grandy appellants raised the same Section 2 claim against the Senate Plan they had argued in the Florida Supreme Court, again seeking a fourth majority Hispanic district in the Dade County area. R. 448. The district court, which had been designated as a three-judge court pursuant to 28 U.S.C. § 2284, granted the motion to amend on June 22, 1992. R. 460. The next day, the United States filed a complaint alleging the same Section 2 violation

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[9] The De Grandy appellants had filed a complaint in the district court for the Northern District of Florida on January 14, 1992. R. 1. The complaint alleged, among other things, legislative impasse and malapportionment (under the 1982 plan). The complaint also prayed for the district court's intervention to redraw Florida's legislative and congressional districts. The subsequent passage, approval, and modification of the Plan mooted this initial claim.

raised in the De Grandy appellants' amended complaint with regard to Dade County's Senate districts. J.A. 73-80. On June 26, 1992, the district court consolidated the complaints for trial. Tr. I, 8.[10]

The trial began on the same day the court entered its consolidation order and lasted five days, until July 1, 1992. Purporting to rely on the decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), plaintiffs attempted to prove that the Senate Plan violated Section 2 by demonstrating that it failed to *maximize* Hispanic voting strength in Dade County. Testimony of Daryl Reaves, Tr. II, 179, 184; Testimony of Allan Lichtman, Tr. III, 28-31, J.A. 366-368; Testimony of Miguel De Grandy, Tr. II, 153-154. The De Grandy appellants introduced an alternative plan containing an additional majority Hispanic VAP district, as did two of the intervenors.[11] At the close of the plaintiff's case, the Senate defendants moved for a directed verdict. Tr. III, 188. The

[10] Other plaintiff intervenors presented alternative plans to the district court and participated at the trial, including: (1) The Florida State Conference of NAACP Branches, which filed a motion to consolidate and a complaint on April 7, 1992, alleging legislative impasse and malapportionment of the then-existing legislative and congressional districts with respect to African-Americans. The district court granted the motion on April 9, 1992; (2) Gwen Humphrey, who along with various other named African-Americans, filed a motion to intervene as plaintiffs on April 7, 1992. R. 79. The district court granted the motion to consolidate the same day. R. 86; and (3) Florida House of Representatives members Daryl Reaves, Corrine Brown, and James T. Hargrett, who filed a motion to intervene as plaintiffs on April 10, 1992. R. 112. On April 13, 1992, the district court granted the motion. R. 116.

[11] Humphrey, *et. al.*, and Hargrett, Brown, and Reaves submitted virtually identical alternative plans. R. 148, R. 156.

NAACP joined in this motion. Tr. III, 194. The district court denied the motions. Tr. III, 216.

In response to the plaintiffs' claim that the Senate Plan violated Section 2, the Senate defendants presented four arguments and supporting evidence. First, they claimed that the Voting Rights Act does not require maximization of minority voting strength. Tr. VIII, 45-46; *see also* Tr. VIII, 51. Second, they argued that, even disregarding the question of citizenship, the Plan provided Hispanics the opportunity to elect candidates of their choice at levels proportionate to their Dade County population. *Id.; see also* Testimony of Ron Weber, Tr. VI, 48, J.A. 457-458. Third, they contended that Hispanics, in fact, were afforded greater than a proportional share of Dade County's senatorial districts in view of testimony that more than half of the voting age Hispanics in Dade County were not citizens and thus only about one-third of the total citizen voting age population in the County was Hispanic. Testimony of William DeGrove, Tr. VII, 20, J.A. 308; Testimony of Ron Weber, Tr. VI, 53.[12] Finally, the

[12] This testimony was based on statistical analyses of 1990 census data. At the time of the trial, census data were available for the voting age populations of Hispanics and citizens separately, but not for Hispanic citizens. *See* Bureau of the Census, Census of Population and Housing, 1990: Summary Tape File 3 (Florida) [machine-readable data files] (1991). Subsequent to the trial, appellees obtained the actual census count of the voting age population of Hispanic citizens in Dade County, which is 350,499. J.A. 236. Now that the census count of Hispanic citizens is known, the actual percentages can be calculated and compared with the trial testimony: 53 percent of Dade County's 738,938 voting age Hispanics are non-citizens, and Hispanics make up 35 percent of the citizen voting age population in Dade County (the total citizen VAP in Dade is 987,346). *See* p. 4, note 4, *supra; see also* 1990 Census at 59.

Senate defendants and the NAACP presented evidence to show that the creation of an additional Hispanic district in Dade County would dilute African-American voting strength in that area. Testimony of Ron Weber, Tr. VI, 67, 135-136, J.A. 460, 469-470; *see also* Testimony of Leon Russell, Tr. III, 110, 127, J.A. 427, 439; Testimony of John Guthrie, Tr. IV, 157-186, J.A. 318-329.[13]

4. *The District Court Decision*. On July 1, 1992, the district court announced its decision from the bench, finding that the Senate Plan did not violate Section 2. *See* Tr. VIII, 53, J.A. 477. Consistent with this ruling, the next day the district court entered its final judgment, upholding the Senate Plan. U.S. App. 5a. With respect to appellants' Section 2 claim, the judgment provides that "[t]he state of Florida's state senatorial districts embodied in the 1992 Florida Senate Plan do not violate Section 2 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973 *et seq.*)." *Id.* 5a.[14]

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[13] The Senate defendants also argued that appellants had failed to satisfy the second and third so-called "*Gingles* preconditions" (*see Thornburg v. Gingles*, 478 U.S. 30 (1986)), which require Section 2 plaintiffs to prove that they are unable to elect their preferred candidates because of polarized voting. Tr. VIII, 41-42; Tr. V, 36-38. The Senate defendants presented evidence demonstrating that Hispanics in Dade County have enjoyed sustained success in electing their candidates of choice at a percentage that exceeds their voting strength. Testimony of Ron Weber, Tr. VI, 60-61, 67-68.

[14] The four paragraph judgment provides:

> 1. The State of Florida's state senatorial districts embodied in Senate Joint Resolution 2-G, as modified by the Florida Supreme Court on June 25, 1992 ["1992 Florida Senate Plan"] do not violate Section 5 of the Voting Rights Act of 1965, as amended, (42 U.S.C. § 1973 *et seq.*).
>
> 2. The Court adopts the 1992 Florida Senate Plan as the plan to be utilized in the 1992 Florida Senate elections and in Florida State Senate Elections thereafter.
>
> 3. The state of Florida's state senatorial districts embodied in the 1992 Florida Senate Plan do not violate Section 2 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973 *et seq.*).
>
> 4. The defendants, individually, and their successors, agents, employees, attorneys, and persons acting in concert or in participation with them shall:
>
> (a) conduct state senatorial elections in 1992 in accordance with the 1992 Florida Senate Plan, a map and written description of which is attached to this Judgment;
>
> (b) conduct state senatorial elections in years after 1992 in accordance with the 1992 Florida Senate Plan.

Id. The United States suggests that the judgment was ambiguous because, while it found no liability under Section 2, it ordered the State to adopt its own Senate Plan. U.S.J.S. at 9, n.7. But there was nothing inconsistent about these two features of the judgment. The court's order requiring the State to comply with the Senate Plan was merely formalization of an earlier oral ruling, which was made in order to eliminate the need for further Section 5 preclearance by the Justice Department. U.S. App. 20a; Tr. I, 37. *See McDaniel v. Sanchez*, 452 U.S. 130 (1981).

Although no post-judgment motions for amendment or rehearing were filed by any appellant,[15] the district court issued an opinion fifteen days later (on July 17, 1992), concluding that the Senate Plan violated Section 2 as to both Hispanic and African-American voters, but that neither

[15] After the court's ruling from the bench on July 1, 1992, the De Grandy appellants made an oral motion for reconsideration, which was immediately denied. Tr. VIII, 61, J.A. 482. No written motions for rehearing were filed after the court issued its judgment on July 2, 1992.

violation could be remedied without impairing the interests of the other minority group. The court stated:

> We held in our order imposing the 1992 Florida Senate Plan that the Florida Senate plan does not violate Section 2 of the Voting Rights Act of 1965, as amended. (Doc. 553.) This language should be read as holding that the Florida Senate Plan does not violate Section 2 such that a different remedy must be imposed. In other words, although the Florida Senate Plan violates Section 2 of the Voting Rights Act, it nevertheless is the best remedy to balance the competing minority interests in Dade County and the South Florida area.

U.S. App. 72a.

In support of its new conclusion, the court found that the three *Gingles* preconditions had been satisfied by both minorities. Specifically, the court found that (1) each minority group, viewed independently, is "sufficiently large and geographically compact" to support an additional district in the Dade County area (U.S. App. 30a-42a); (2) each minority is "politically cohesive" within its own group (*id.* at 48a); and (3) each minority has had its candidates defeated by "white bloc voting" (*id.* at 48a-53a). The court also found that both groups had suffered discrimination in areas other than voting. *Id.* at 54a-55a.

The district court went on to determine that the best remedy for these violations was the Florida Senate Plan itself. Based on the record — including the alternative plans submitted by the other parties — the court found "that the creation of a fourth Hispanic VAP supermajority district

would adversely affect African-Americans in South Florida and that the creation of a third [African-American] VAP majority district would adversely affect Hispanics in Dade County." *Id.* at 64a. The court thus concluded that "the Florida Senate Reapportionment plan is the fairest to all ethnic communities in Dade County and the surrounding areas." *Id.* at 66a.[16]

SUMMARY OF ARGUMENT

The district court's judgment correctly holds that the Florida Senate Plan does not violate the rights of Hispanics under Section 2 of the Voting Rights Act. We will defend that judgment on two separate grounds.[17]

1. We rely first on a straightforward numerical analysis. Hispanics make up approximately half of the VAP in Dade County and, under the Florida Plan, they have the undisputed ability to elect representatives of their choice in three of the six Senate districts to which Dade County is entitled. These

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[16] Judge Vinson joined the court's opinion, but wrote separately to emphasize the points that he considered dispositive. *Id.* at 73a-76a.

[17] Although the district court's subsequent opinion contradicts the clear language of its judgment (*see* pp. 10-12, *supra*), it is axiomatic that this Court "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987). Where an opinion conflicts with a judgment, the judgment controls. *Eakin v. Continental Illinois Nat. Bank & Tr. Co.*, 875 F.2d 114, 118 (7th Cir. 1989). *See* Appellees' Motion to Dismiss or Affirm at 12-14. Consequently, we did not pursue an appeal from the court's erroneous opinion, but have sought instead to have its judgment affirmed on grounds advanced in the district court. *Ibid.*

numbers conclusively demonstrate that Hispanics have not been accorded "less opportunity than other members of the electorate . . . to elect their preferred representatives." Section 2(b), 42 U.S.C. § 1973. Hispanics are given precisely the same opportunity: half the districts for half the people.

The district court ignored this proportionality argument, holding instead that proof of the three "preconditions" set out in *Thornburg v. Gingles,* 478 U.S. 30 (1986) — geographic compactness, minority cohesion, and white bloc voting — was sufficient to establish a Section 2 violation. That ruling not only flies directly in the face of the statutory language, but also reflects an obvious misapplication of *Gingles*, a multimember district case, to a single-member district case like this one. Under a single-member plan, despite the presence of the *Gingles* preconditions, a protected minority may still be able to elect a proportional share of representatives, or more, depending on how the district lines are drawn. Thus, basing a single-member district violation solely on the *Gingles* preconditions will necessarily result in a maximization rule for minority representation. Such an approach is irreconcilable with the "equal opportunity" mandate of the statute. *Voinovich v. Quilter,* 113 S. Ct. 1149, 1156 (1993).

The United States recognizes this point and thus seeks to defeat our proportionality showing by arguing that it impermissibly fails to take into account all Hispanics living in Florida — even those who reside hundreds of miles *outside* Dade County. That position, aside from not having been raised below, is wrong as a matter of law and, in any event, no help to appellants on the facts of this case. It is wrong because it ignores the *Gingles* requirement of "geographical

compactness" that a plaintiff must establish to prevail in any Section 2 case. Compactness ensures, as the statute requires, that governmental action — and not private residential choice — is the cause of a denial of electoral opportunities to a protected minority. Appellants' "statewide" argument is also unhelpful because, even on that basis, the Florida Senate Plan accords proportional representation. Hispanics account for approximately 7 percent of Florida's eligible voters, thus entitling them to effective voting control over three Senate districts (7% of 40), which is exactly the number they receive under the Senate Plan. The De Grandy appellants' effort to get around this problem, by including non-citizen Hispanics in determining proportionality, is plainly inconsistent with the statute, which is expressly intended to protect the "right of any *citizen* . . . to vote." Section 2(a) (emphasis added).

2. The second reason for affirming the judgment below is that, even when the facts are viewed through the maximization lens employed by the district court in this case, there is no violation here. The district court found that, given existing residential patterns, any effort to create a fourth Hispanic-controlled district would diminish the ability of African-Americans to elect representatives of their choice. U.S. App. 63a. Based on this fact, in turn, the court ruled that the Florida Senate Plan "is the *fairest* to all ethnic communities in Dade County." *Id.* at 66a (emphasis added). That finding compels the conclusion that the Senate Plan complies with Section 2 — it accords proportional representation to two competing minority groups, neither of whose opportunity to elect representatives can be improved without diminishing the opportunity of the other. Contrary to appellants' contentions, the district court's factual finding concerning mutual fairness

is amply supported by the record and there is no basis to remand for an additional hearing on this issue.

ARGUMENT

I. THE FLORIDA SENATE PLAN PROVIDES HISPANICS IN DADE COUNTY THE SAME OPPORTUNITY AS IT PROVIDES OTHER VOTERS TO ELECT REPRESENTATIVES OF THEIR CHOICE

It cannot be disputed that, under the Florida Senate Plan, Hispanics in Dade County have the ability to elect representatives of their choice in precisely the same proportion as their population. This is true no matter how the numbers are viewed. Hispanics comprise half the VAP in Dade County, and they have voting control over three of the six districts to which Dade is numerically entitled. Hispanics comprise 45 percent of the VAP in the seven districts wholly or partially made up of Dade County, and they have voting control over 43 percent of those districts. And Hispanics comprise 54 percent of the VAP in the five districts wholly in Dade County, and they have voting control over 60 percent of those districts. U.S. Exh. 34. Nothing in the district court's opinion or appellants' arguments explains why these basic facts do not defeat the Section 2 claim in this case.[18]

[18] This numerical analysis is based on a comparison of VAP percentages, which, if anything, *overstate* the claims of Hispanics because more than half of the Hispanic VAP is non-citizen and therefore ineligible to vote. If we are correct that a proper comparative analysis under Section 2 would rely on eligible-voter numbers (*see* pp. 30-32, *infra*), then Hispanics receive *more* than proportional representation because they comprise only about one-third of the eligible voters in Dade County, which means that proportionally they would be entitled to control only two Senate districts, instead of the three provided under the State Plan.

A. A Plan That Provides Protected Minorities With Proportional Representation Cannot Violate Section 2 In A Single-Member District Case, Even If The Three *Gingles* Preconditions Are Present

In its opinion, the district court held that proof of the *Gingles* preconditions establishes a Section 2 violation even though the plaintiff minority is given proportional representation within those districts that compose the "geographically compact" area that satisfies the first of these preconditions.[19] That view cannot be squared with the statute or with this Court's precedents interpreting it.

Section 2 prohibits any voting requirement, practice, or procedure that results in "members [of a minority] hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their own choice." The specific claim in vote dilution cases is that the government has impaired a minority group's opportunity to elect representatives of its choice "either 'by the dispersal of the group into districts in which they

[19] In addition to the three preconditions, the only other consideration mentioned by the court to support its liability conclusion is a finding concerning various forms of discrimination in areas other than voting. U.S. App. 53a-54a. As the court's discussion on this point makes clear, this finding will be available in virtually every voting rights case.

constitute an ineffective minority of voters or from the concentration of [the group] into districts where they constitute an excessive majority.' " *Voinovich,* 113 S. Ct. at 1155 (quoting *Gingles,* 478 U.S. at 46, n.11). Such dilution can occur in either of two kinds of districting structures: (1) in a multimember election district system where the white majority is consistently able to vote together to defeat the minority's preferred candidates; or (2) in a single-member district system where the minority group is fragmented among districts or overly concentrated within them.

In *Gingles,* a multimember district case, the Court held that a plaintiff had to prove three essential "preconditions" to liability: *first,* "that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single-member district"; *second,* that it is "politically cohesive"; and *third,* "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50-51 (footnotes omitted). Once these showings are made, the trial court must make an overall factual determination, based on the "totality of circumstances," whether the minority group has been denied the opportunity "to participate equally in the political process and to elect candidates of their choice." *Id.* at 80.[20]

[20] In addition to the three preconditions, the other factors subsumed in the "totality-of-circumstances" inquiry include such matters as historical voting practices, the effects of discriminatory practices in areas other than voting, and whether campaigns are characterized by racial appeals. 478 U.S. at 36-37. These factors were contained in the Senate Report on the bill that became the current version of Section 2. S. Rep. No. 97-417, 97th Cong., 2d Sess. 196-201 & 204-213 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177.

The three *Gingles* preconditions, as the Court held earlier this year, must also be established in a vote dilution case involving a single-member district plan. *See Voinovich; Growe v. Emison,* 113 S. Ct. 1075 (1993). But it does not follow, as the court below erroneously believed, that the legal analysis for single-member and multimember district claims is identical. *See Voinovich* at 1157 ("The *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim."). In fact, there is a fundamental difference between the two types of claims that must be respected if the statute is to be given its proper meaning. In a multimember case, the presence of the *Gingles* preconditions arguably may be enough to establish a violation because it will mean that a minority group would have been able to elect representatives of its choice in single-member district elections, but that it has been unable to do so when submerged in a multimember district. In that specific respect, at least, minority voters in a multimember district case *are* denied the same opportunity accorded the white majority, which obviously can elect representatives of its choice in a multimember district where the *Gingles* preconditions are met.

In a single-member district case, by contrast, proof of the *Gingles* preconditions can *never* be sufficient, in itself, to establish a violation. This is true because, despite the presence of those preconditions, a wide range of plans having more or fewer minority-controlled districts can be drawn. For example, in a city with 50 percent minority voters, plans with six single-member districts could typically be drawn to have

anywhere from one to five minority-controlled districts.[21] In that circumstance, if the *Gingles* preconditions are sufficient to establish a violation, then minority voting strength will always have to be maximized. Four or even five districts will be required, even though the minority group comprises only half the electorate and thus, on a straight proportionality basis, would be entitled to control only three districts.

Section 2 cannot properly be read to include such a maximization principle. If the statutory prohibition against providing minorities "less opportunity than other members of the electorate . . . to elect representatives of their choice" is given its natural meaning, it cannot be violated by a single-member district plan that assures minority groups voting control over numbers of districts that are numerically proportional to their population in the area where presence of the three *Gingles* preconditions has been established. By hypothesis, such an allocation accords minority and other voters the *same* opportunity to elect their preferred representatives. *See Voinovich,* 113 S. Ct. at 1156 ("Only if the apportionment scheme has the *effect* of denying a protected class the *equal* opportunity to elect the candidate of choice does it violate § 2.") (second emphasis added).

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[21] The publication of block-level census population counts and maps now typically makes it possible to "string" together contiguous blocks to achieve almost any targeted demographic result. More than 30 percent of the blocks in Florida (and more than 20 percent of the blocks in Dade County) have zero population and can be used for "linking" geographically disparate areas to produce a wide variety of demographic profiles for districts. *See* Bureau of the Census, Census of Population and Housing, 1990: Public Law (P.L.) 94-171 Data (Florida) [machine-readable data files] (1991).

Far from undermining this conclusion, as the court below implicitly found, *Gingles* confirms it. Six Justices in that case agreed that "persistent proportional representation is inconsistent with appellees' allegation that the ability of black voters . . . to elect representatives of their choice is not equal to that enjoyed by the white majority." 478 U.S. at 77 (opinion of Brennan, J., joined by White, J.); *see id.* at 103-05 (opinion of O'Connor J., joined by Burger, C.J., and Powell and Rehnquist, J.J.).[22] *See also Baird v. Consolidated City of Indianapolis,* 976 F.2d 357, 360 (7th Cir. 1992) ("Blacks who have influence proportional to their numbers do not state a claim under § 2(a)."), *cert. denied,* U.S.L.W. 3771 (U.S. May 17, 1993); *Nash v. Blunt,* 797 F. Supp. 1488, 1496 (W.D. Mo. 1992) (3 judges) (rejecting maximization claim in a single-member district case), *sum. aff'd sub nom., African American Voting Rights Legal Defense Fund, Inc. v. Blunt,* 113 S. Ct. 1809 (1993).[23]

In summary, the conclusion that the Florida Senate Plan violates Section 2 cannot stand on the basis of the district court's opinion. Bottom-line results — here, undisputed

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[22] Both opinions suggest, without elaboration, that "it may be possible for § 2 plaintiffs to demonstrate that such sustained success does not accurately reflect the minority group's ability to elect its preferred representatives." 478 U.S. at 77 (footnote omitted); *see* 478 U.S. at 104. Here, as in *Gingles,* however, "[plaintiffs] have not done so." 478 U.S. at 77.

[23] Because *Gingles* was a multimember district case, the question of "persistent" minority representation was important. *See* 478 U.S. at 74-76. In a single-member district case, where boundaries are drawn every ten years based on new census data, persistence is built into the plan itself.

proportionality — must inevitably trump antecedent "preconditions" in "assessing the ability of a protected class to elect its candidates on an equal basis with other voters." *Voinovich,* 113 S. Ct. at 1155.

B. Appellants' Statewide Theory Of Proportionality, Raised For The First Time On This Appeal, Is Legally Unsound And Factually Nonmeritorious

In an attempt to find an alternative rationale for the district court's conclusion, appellants now claim that our proportionality argument is flawed because it fails to establish that Hispanics throughout the State — rather than those residing in Dade County — are proportionally represented.[24] This contention should be rejected for three independent reasons: (1) it was never raised below; (2) it is legally unsound, because it disregards the statutory requirement that government action, not private residential choice, be responsible for preventing a minority from electing representatives of its choice; and (3) it is factually unavailing because, even on a statewide basis, Hispanics comprise 7.15 percent of Florida's citizen population, which is the relevant number for assessing *voting* rights claims, and thus are proportionally entitled to

[24] This argument was advanced by the United States in its filings in response to our Motion to Dismiss or Affirm in Nos. 92-593, 92-767, and to the Florida House of Representatives' Jurisdictional Statement in No. 92-519. The private appellants (De Grandy, *et al.*) indicated that they "agree" with United States's argument on statewide proportionality in their Motion to Dismiss or Affirm, Nos. 92-519, 92-767, at 21.

voting control in only three of the state's forty Senate districts.

1. *Failure To Raise.* There is no question that appellants were fully aware of our Dade County proportionality argument, which was prominently and repeatedly featured in the district court. Testimony of Ron Weber, Tr. VI, 48, J.A. 457-458; Tr. VIII, 51. Yet, at no point did either appellant challenge the argument on the ground that it failed to take account of Hispanics living outside the County. On the contrary, appellants expressly claimed, and agreed to limit their Senate challenge to, vote dilution *in Dade County. See* U.S. Complaint ¶ 8, J.A. 75-76; Tr. 1, 51, J.A. 277. In accord with their position, neither appellant submitted any evidence to show *statewide* Hispanic vote dilution, not even evidence relating to the three *Gingles* preconditions, which the appellants concede is necessary to support a vote dilution claim. There is no justification for this omission and therefore no reason to allow an unsupported legal theory to be raised for the first time in this Court. *See, e.g., Youakim v. Miller,* 425 U.S. 231, 234 (1976); *United States v. Mendenhall,* 446 U.S. 544, 551-52, n.5 (1980).[25]

[25] The United States lifts a line out of context from its complaint to suggest that it alleged statewide vote dilution. *See* U.S. Br. in Opp. to Motion to Dismiss or Affirm, No. 92-767, at 3-4. In fact, however, its complaint and its representations at trial expressly indicate that it was claiming and attempting to prove vote dilution, not on a statewide basis, but only "in several *areas* of the state" — and as to the Senate, in particular, only in Dade County. U.S. Complaint ¶ 8, J.A. 75-76 (emphasis added); *see also* Tr. 1, 51, J.A. 277. Similarly, the United States now attempts to suggest that there was trial evidence that would support a statewide finding of "racially polarized voting." U.S. Motion to Affirm In Part and Vacate In Part, No. 92-519, at 12, n.3. Significantly, the one cite referenced for that claim is not to evidence put on by the

2. *The Theory Is Legally Unsound.* Relying on their new-found statewide proportionality argument, appellants now claim that it makes no difference under Section 2 that Hispanics in Dade County are accorded the same opportunity to elect representatives of their choice as are whites in Dade County. Rather, the relevant legal question in resolving whether the Senate Plan in Dade County violates Section 2, they say, is whether Hispanics *throughout Florida* have been given the same opportunity as have whites throughout the State. This theory is at war with Section 2's language and this Court's decision in *Gingles*. It should be rejected.

Section 2 requires minority plaintiffs to show not only a denial of equal opportunity, but also that the denial was caused by *government* action — *i.e.*, a "voting qualification or prerequisite to voting or standard, practice, or procedure . . . *imposed or applied by any State or political subdivision.*" Section 2(a), 42 U.S.C. § 1973 (emphasis added). That requirement is improperly discarded under appellants' statewide theory. By drawing district boundaries that do *not* dilute minority strength within reasonably compact geographical areas, the State cannot fairly be said to be diluting the vote of minorities who happen to live in remote areas, where they are too few in number to achieve voting control. In such circumstances, Section 2 "simply does not speak to the matter," precisely because it is private residential choice rather than the state's "apportionment scheme [that] has the

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United States. In any event, the district court made no statewide findings and it is clear that there was no evidence — because there could be none — to satisfy the first *Gingles* factor on a statewide basis. *See* pp. 25-27, *infra*.

effect of denying a protected class the equal opportunity to elect their candidate of choice." *Voinovich*, 113 S. Ct. at 1156 (emphasis supplied).

The Court in *Gingles* made this point directly. Indeed, the whole purpose of the first "precondition" — that a minority group be "sufficiently large and geographically compact" — is to ensure that government action is the cause of vote dilution. As the Court explained:

> Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. . . . Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small compared to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure.

478 U.S. at 50, n.17 (emphasis in original).

In other words, Section 2 requires that minority voters be sufficiently numerous and geographically compact because only then can they be denied an equal opportunity to elect representatives through the government's "manipulation of district lines." *Voinovich*, 113 S. Ct. at 1155. For that reason, we submit, six Justices in *Gingles* found proportionality *within a single district* to be a complete defense to a Section 2 claim, even though statewide proportionality had

not been achieved. *See Gingles,* 478 U.S. at 103 (O'Connor, J., concurring) ("The district court clearly erred to the extent that it considered electoral success in the aggregate rather than in each of the challenged districts, since, as the Court states, '[t]he inquiry into the existence of vote dilution . . . is district specific.' ") (quoting 478 U.S. at 61, n.28).

The United States's contrary argument simply neglects to mention the first *Gingles* precondition. *See* U.S. Br. in Opp. to Motion to Dismiss or Affirm, No. 92-767, at 3-7; U.S. Motion to Affirm in Part and Vacate in Part, No. 92-519, at 11-14.[26] Thus, even if the United States had, as it incorrectly argues here, brought a suit to require Florida "to remedy dilution throughout the State" (*id.* at 12), that claim obviously would have been insupportable. The State of Florida is far too large an area to satisfy the *Gingles* requirement of numerosity within a geographically compact area. Outside

[26] The United States seeks instead to support its statewide claim by reference to the second and third *Gingles* preconditions — "voting is polarized along ethnic lines throughout the State" (*id.* at 12, n.3). That suggestion is as wrong as it is insufficient. The notion that there is statewide cohesion among Hispanic voters, far from being supported by the record, is strongly undermined by it. The evidence demonstrates that, while Hispanic voters in Dade County generally vote Republican, Hispanics in other areas tend to vote Democratic. *See, e.g.,* J.A. 164, Aff. of Dr. Thomas B. Hofeller (expert for De Grandy appellants) ("Tampa's Hispanic community is predominantly Democratic and, *as noted by the Department of Justice,* is cohesive with black voters") (emphasis added). Even within Dade County, there are exceptions to the general rule. In particular, as the district court found, Hispanic farm workers in south Dade County tend to vote Democratic and are politically cohesive with African-Americans. U.S. App. 65a-66a; Testimony of Representative Willie Logan, Tr. III, 147.

Dade County, Hispanics are too few in number and too dispersed to compose a majority-minority district.[27]

The United States's effort to eliminate the first *Gingles* precondition and to recast proportionality on a statewide basis is not assisted by its argument that, in vote dilution cases generally, some minorities end up "liv[ing] outside the remedial district." U.S. Motion to Affirm in Part and Vacate in Part, No. 92-519, at 12 (citing cases). That fact is equally true when minorities *do* live in a geographically compact area, and simply reflects the inevitable effect of the "group rights" theory that undergirds vote dilution cases. Indeed, Section 2 prohibits the packing of minorities " 'into districts where they constitute an *excessive* majority.' " *Voinovich,* 113 S. Ct. at 1155 (quoting *Gingles,* 478 U.S. at 46, n.11) (emphasis added). The authorities relied on by the United States make this obvious point (*see, e.g., McGhee v. Granville County,* 860 F.2d 110, 118, n.9 (4th Cir. 1988), but they cannot fairly be extrapolated to support the very different notion that geographically dispersed minority voters must be "represented" by elected officials from distant reaches of the State in order to ensure "equal opportunity" for minorities. *Cf. McGhee,* 860 F.2d at 119 ("*Gingles* . . . 'precludes some small and unconcentrated minority groups from attempting to rectify vote dilution.' ") (quoting *McNeil*

[27] The total population of all census blocks outside Dade County having a majority Hispanic VAP is 111,421, and the total Hispanic VAP of those blocks is 53,087. The blocks are spread across 64 counties (only Baker and DeSoto are not represented) and the only county with more than 10,000 Hispanic VAP is Hillsborough, with 19,223. 1990 Census, Public Law (P.L.) 94-171 Data.

v. Springfield Park Dist., 851 F.2d 937, 944-45 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989)).[28]

Finally, the United States attacks our geographic approach to proportionality on the ground that it "cannot work" because "plaintiffs will almost always be able to define an area in which there is not proportional representation, while defendants will almost always be able to define an area in which there is." U.S. Br. In Opp. to Motion to Dismiss or Affirm, No. 92-767, at 6. But only by choosing to untie its own analysis from the first *Gingles* precondition (and its rationale) can the United States advance this specious argument. The boundaries under our theory are clearly

[28] The United States is similarly incorrect in asserting that this case is "precisely parallel to *Davis v. Bandemer*, 478 U.S. 109 (1986)." U.S. Br. in Opp. to Motion to Dismiss or Affirm, No. 92-767, at 4. While the plurality there said that "appellees' claim, as we understand it, is that Democratic voters over the State as a whole, not Democratic voters in particular districts, have been subjected to unconstitutional discrimination" (478 U.S. at 127), the difference is that in Ohio, concentrations of Democratic voters could be found statewide, while Florida's concentration of Hispanic voters is in a single county. Thus, in *Davis*, the state's "reapportionment plan" — not private residential choice — affected Democrats on a statewide basis.

It is also instructive that the plurality in *Davis* rebuffed the Democrats' claim, finding that, although their candidates received 52 percent of the vote but won only 43 percent of the elections, these numbers did not indicate a "continued frustration of the will of the majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." *Id.* at 133. In this case, of course, the undisputed numbers demonstrate that Hispanics could not make even a statewide claim as strong as the one rejected in *Davis* — they have 12 percent of the total population and receive voting control over 7.5 percent of the districts.

defined by the *Gingles* requirement of geographical compactness. Here, of course, they were chosen by the appellants, presumably in order to maximize minority representation to the extent possible. Having drawn those boundaries — and having then sought to satisfy the *Gingles* preconditions with respect to them — appellants can hardly be heard to complain when they are required to stay within them.

3. *A Statewide Proportionality Theory Is No Help to Appellants Here.* Appellants' reliance on statewide numbers as the measure for testing proportionality is also futile. Even on that basis, Hispanics comprise 7.15 percent of the eligible voters in Florida. *See* U.S. Mot. to Affirm in Part and Vacate in Part, No. 92-519, at 14, n.5 (citing 1990 census data). That means Hispanics are proportionally entitled to voting control over three (or 7.5 percent) of the forty Senate districts in Florida. And that, as the district court found in this case, is the number that Hispanics are able to control under the Florida Plan (*i.e.*, the three seats in Dade County). U.S. App. 64a.

The United States appears to agree with the force of this contention, but nevertheless argues that the case should be remanded for the district court to consider the issue. *See* U.S. Br. in Opp. to Motion to Dismiss or Affirm, No. 92-767, at 6-7. There is no reason for another round of litigation, however. The 7.15 percent census figure is disputed by no one, which is hardly surprising given the fact that, in proving their case, appellants themselves relied on data from the

identical census that yielded the citizenship numbers.[29] Such census data, of course, routinely provide the essential numerical information in voting rights cases, and courts frequently take judicial notice of them. *See, e.g., Barber v. Ponte,* 772 F.2d 982, 998 (1st Cir. 1985), *cert. denied,* 475 U.S. 1050 (1986); *Wyche v. Madison Parish Police Jury,* 635 F.2d 1151, 1157 (5th Cir. 1981). The only reason that the precise number of Hispanic non-citizens was not introduced at trial here was because "Hispanic citizenship data [was] not available." U.S. App. 74a (concurring opinion); *see* p. 9, note 12, *supra,* p. 4, note 4, *supra.* But that is no justification for disregarding the undisputed number now that it is available, or for needlessly prolonging this case.

Unlike the United States, the De Grandy appellants contend that citizenship numbers are irrelevant in a vote dilution case and that the district court properly used VAP numbers. *See* De Grandy Motion to Dismiss or Affirm, Nos. 92-519, 92-767, at 14-15. That argument ignores the language and purpose of the statute, which is intended to protect the "right . . . to vote," a right available only to citizens. Indeed, it is oxymoronic to suggest that Section 2 affords non-citizens an "opportunity . . . to elect representatives of their choice." The Voting Rights Act protects eligible voters, a point made three times in the text of the statute, which speaks of "the right of any *citizen* of the United States to vote"; requires that the election process be "equally open to

[29] For example, the 50 percent number for Hispanic VAP in Dade County (or, indeed, the 12 percent number for statewide Hispanic VAP), as well as the numbers concerning each individual Senate district, all came from the same 1990 census count.

participation by members of a class of *citizens*"; and protects minority voters from receiving "less opportunity than other *members of the electorate.*" Section 2, 42 U.S.C. § 1973 (emphasis added). In accord with this statutory language and purpose, the courts of appeals have uniformly held that the number of citizens, not overall population, is relevant in Section 2 cases. *See Romero v. City of Pomona,* 883 F.2d 1418 (9th Cir. 1989); *McNeil v. Springfield Park Dist.,* 851 F.2d 937 (7th Cir. 1988), *cert. denied,* 490 U.S. 1031 (1989); *Brewer v. Ham,* 876 F.2d 448 (5th Cir. 1989); *see also Gingles,* 478 U.S. at 50-51, n.17 (requirement of sufficiently large and geographically compact districts based on "minority voters").[30]

Ignoring Section 2's language and purpose, the De Grandy appellants attempt to support the contrary conclusion by arguing that because the Florida Senate districts were drawn on the basis of population, the issue of proportionality must be similarly resolved. According to these appellants, "[t]he dual population base measure . . . would allow the Anglo community of South Florida to use the higher minority population to locate additional seats in that region of the State, but would prevent the Hispanic community from sharing in the benefit of those additional seats." De Grandy Motion to Dismiss or Affirm, Nos. 92-519, 92-767, at 14 (footnote omitted). Even if the premise of this argument were

[30] The De Grandy appellants rely on *Garza v. County of Los Angeles,* 918 F.2d 763 (9th Cir. 1990), *cert. denied,* 498 U.S. 1028 (1991), which upheld the use of population numbers in a Fourteenth Amendment challenge to a reapportionment plan. That ruling, whatever its merit, is unconstrained by the "citizen" language that controls Section 2. The Fourteenth Amendment, by contrast, extends to all "person[s]."

correct, however, it would still be wrong to conclude that Hispanics were "prevent[ed] . . . from sharing in the benefit." *Id.* As we have shown, Hispanics have voting control in three of the six districts which Dade County is entitled to receive on the basis of population. They thus did in fact share in any benefit that might have arisen from using such numbers to allocate Senate districts in Florida. But on a *statewide* basis — which is where the appellants, not we, claim that proportionality should be assessed — a comparison based solely on citizenship is entirely consistent in its treatment of both Hispanics and other voters.

II. THE DISTRICT COURT'S FACTUAL FINDING THAT THE FLORIDA SENATE PLAN MOST FAIRLY BALANCES THE COMPETING INTERESTS OF AFRICAN-AMERICAN AND HISPANIC VOTERS ALSO DEMONSTRATES THAT THE PLAN DOES NOT VIOLATE THE VOTING RIGHTS ACT

This case presents a unique consideration that would compel affirmance of the judgment below even if the district court's maximization theory were correct. In the Dade County area, there are two substantial minority groups, Hispanics and African-Americans, and these groups have sharply "competing interests." U.S. App. 63a. (Hispanics support Republicans, African-Americans support Democrats, and each group tends to prefer white candidates over candidates preferred by the other group. *Id.* at 44a, 49a-50a.) This fact, viewed in the context of existing residential patterns, means that, as the district court found, although each minority group can increase *its* voting power, it can only do so at the expense of the other group. *Id.* at 63a-64a. Thus, the court concluded, of "all the plans presented to the court, the Florida Senate Reapportionment plan is *fairest* to all the ethnic communities in Dade County and the surrounding areas." *Id.* at 66a (emphasis added).

This "fairness" finding can only mean that Section 2 was not violated here. It is one thing for a State to make adjustments between a protected minority group and the competing interests of the *white* majority. But it is obviously a very different matter to make such adjustments solely affecting the competing interests of *two protected minority groups*. Even if the statute imposes a maximization requirement, therefore, that requirement surely would have to give way when an attempt to maximize one protected group's interests simultaneously would erode the interests of another protected group. It simply makes no sense to read Section 2 as disabling a state from balancing these competing interests "fairly" — in this case by effectively providing at least proportional representation to both groups.[31]

Appellants dispute this conclusion on two grounds: first, the United States argues that one of the plans before the district court (Plan 180) established a fourth Hispanic district without impairing the interests of African-American voters;

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[31] On the basis of its "fairness" finding, the district court's opinion concludes that "although the Florida Senate Plan violates Section 2 of the Voting Rights Act, it nevertheless is the best remedy." U.S. App. 72a. Predictably, appellants fasten on the incongruity of adopting a plan that violates the statute as a remedy for the violation. The obvious answer to this seeming conundrum is that the finding can only mean there was *no* violation, as the court correctly found in its earlier judgment.

and second, both appellants claim that they were entitled to an additional hearing to introduce yet more plans in an attempt to show that four Hispanic and three African-American Senate districts can be successfully drawn. Neither argument has merit.

To start with, while the United States challenges the district court's "fairness" conclusion, it neglects to mention that such a determination is a finding about "vote dilution [which is] a question of fact subject to the clearly-erroneous standard of Rule 52(a)." *Gingles,* 478 U.S. at 78. That demanding standard for reversal cannot be met here. As the district court found, under the Senate Plan, African-Americans are effectively able to elect representatives of their choice in *three* Senate districts in South Florida — one wholly in Dade, one partially in Dade, and one in the counties just north of Dade. U.S. App. 64a-65a. This is true, as the evidence concerning past elections demonstrates, even though, in one of those districts, African-Americans constituted 36 percent of the VAP. *See id.* at 65a ("African-Americans [in District 40] can elect a candidate of their choice because of strong minority coalitions between African-Americans and Mexican-Americans, as well as white cross-over votes").[32] On the other hand, as the district court also

[32] Notably, in the 1992 election, which was conducted under the Senate Plan, the African-American candidate in District 40 won election with 66 percent of the Democratic primary vote over the white candidate. Both candidates were incumbent House members, and the seat was uncontested in the general election. Div. of Elections, Fla. Dept. of State, State of Florida Official Primary Election Returns, Sept. 1 & 8, 1992, Oct. 1, 1992; Div. of Elections, Fla. Dept. of State, State of Florida Official General Election Returns, Nov. 3, 1992.

found, under Plan 180 — on which the United States relies — African-Americans would likely be able to elect their preferred candidates in only *two* South Florida Senate districts. U.S. App. 62a-63a. While the United States maintains that African-Americans would have been able to control a third district in Plan 180, made up of 47 percent African-American VAP, the district court's contrary conclusion is well supported by expert testimony based on voting history and testimony at public hearings.[33]

Appellants' alternative argument, that they are entitled to a remand for further hearings on this issue, is equally unsound. Appellants complain that they were not required to anticipate that the district court would find the Senate Plan in violation of the Section 2 rights of African-Americans and, accordingly, they were under no obligation to submit a plan that would remedy such a violation. But that argument misses the point. The district court faulted the plans supported by the appellants, not because they failed to remedy a violation of African-Americans' rights, but because their attempt to remedy the alleged violation of Hispanics' rights *worsened*

[33] The United States suggests that a 47 percent African-American district is certainly more likely to elect a representative preferred by African-Americans than is a 36 percent district. The district court was more careful in its analysis. Based on the evidence, it recognized that, normally, African-Americans can elect their preferred candidate only when they compose more than half the VAP. U.S. App. 62a-63a. District 40 of the Florida Senate Plan is unique, largely because of the presence of a substantial population of Hispanic farmworkers in south Dade County that is politically cohesive with African-Americans in the district — a fact confirmed by past voting patterns. Testimony of Representative Willie Logan, Tr. III, 147, U.S. App. 65a-66a. Testimony of John Guthrie, Tr. IV, 155, U.S. App. 65a.

the situation of African-Americans. As to that issue, appellants were fully aware of the district court's concerns. The court early on made it clear to all parties that the NAACP's sole function at trial was limited to introducing evidence as to "whether establishment of the fourth Hispanic district would have a regressive effect on African-American voters." U.S. Juris. St'mt 4-5 (record citations omitted). There was clearly no surprise here.

More fundamentally, the simple fact is that an electoral map with four Hispanic districts cannot reasonably be drawn in the Dade County area without simultaneously disadvantaging African-Americans. The proposals that attempted to do otherwise went far beyond the compact seven-district area covered by the Florida Senate Plan. One proposed plan involved eight new counties (in addition to Dade, Monroe, and Broward) and an area up to 110 miles wide extending 125 miles north of Dade County. *See* Senate Def. Exh. 3. The other involved seven new counties and an area up to 50 miles wide extending 145 miles north of Dade County. *See* Senate Def. Exh. 4. If, within that incredibly wide swath, two separate plans, while obviously trying to do so, could not create a fourth Hispanic district without having a negative impact on African-American voters, it plainly must mean that the balance struck by the Florida Senate Plan — in a far more compact area — is fair and reasonable, as the district court found.

That "fairness" finding supports the district court's deference to legislative policy choices for balancing these competing interests. Tr. VIII, 53, J.A. 477 ("Consequently, under Supreme Court precedent, this Court must give deference to the state policy as expressed in the Florida plan as validated

by the Florida Supreme Court."); *see also* U.S. App. 64a; *Scott v. Germano*, 381 U.S. 407 (1965). Moreover, it amply justifies the conclusion that the State Plan does not violate Section 2. There is thus no warrant for perpetuating this inquiry, even if some incredibly contorted line-drawing could possibly mark out boundaries that would allow Hispanics to elect four representatives without eroding the ability of African-Americans to elect three.

CONCLUSION

The district court judgment of no liability should be affirmed.

Respectfully submitted,

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